REMARKS

Applicant added new claims 33-40 to provoke an interference with U.S. Patent No. 6,589,247 to McGahan et al. under 37 C.F.R. § 607. Claims 33, 34, and 39 are supported by the specification at least on page 28 at lines 27-30. and Figs. 2-4; claim 35 is supported by the specification at least on page 22 at lines 19-21 and page 28 at lines 27-30, and Fig. 3; claims 36 and 38 are supported by the specification at least on page 28 at lines 27-30, and page 22 at lines 15-23, and Figs. 2-4; claim 37 is supported by the specification at least on page 29, lines 20-23; and claim 40 is supported by the specification at least on page 28, lines 25-27.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1068.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: July 1, 2004

By: _____
Amedeo F. Ferraro
Registration No. 37,129

1557 Lake O'Pines Street, NE
Hartville, Ohio 44632
Telephone: (330) 877-0700
Facsimile: (330) 877-2030

PATENT
Attorney Docket No. 102.0003-05000
Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	Confirmation No. 1113
Gary K. Michelson, M.D.	)	
Serial No.: 10/692,545	)	(Group Art Unit: 3731)
Filed: October 24, 2003	)	(Examiner: U. Ho)
For: DISTRACTOR FOR USE IN SPINAL SURGERY	)	

Office of Initial Patent Examination
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

3rd REQUEST FOR INTERFERENCE UNDER 37 C.F.R. § 1.607

Applicant hereby requests an interference with U.S. Patent No. 6,589,247 to McGahan et al. (hereinafter, "McGahan") pursuant to 37 C.F.R. § 1.607(a). A proposed count is attached hereto.

Claims 1, 4, 9, 11, 14, 15, 18, and 19 of McGahan correspond to claims 1-8 of the proposed count. Claims 33-40 of the present application also correspond to claims 1-8 of the proposed count.

Claim 1 of the proposed count is supported in Applicant's disclosure, for example, in the specification on page 28, lines 27-30; and Figs. 3-4. As shown in Fig. 3, the distraction member has a distraction tip 122 (Fig. 3) adapted for insertion between the adjacent vertebral bodies to distract the disc space. (See Figs. 2 and 4). Applicant further discloses at least one fin 126 secured to the distraction tip, at least a portion of which extends transversely and is adapted to engage a corresponding one of the adjacent vertebral bodies. (See Specification, page 28, lines 27-30; Fig. 3).

For claim 2 of the proposed count, Applicant discloses a distraction tip 122 having a tapered distal portion (Fig. 3) and at least one fin 126, at least a portion of which extends transversely and is adapted to engage a corresponding one of the

adjacent vertebral bodies. (See Specification, page 28, lines 27-30; Fig. 3).

For claim 3 of the proposed count, Applicant discloses a distraction tip 122 (Fig. 3) and a hub 128 extending axially from the tip, a portion of the hub extending transversely to form a shoulder. (See Specification, page 22, lines 19-21). Applicant further discloses at least one fin having at least a portion which extends transversely from the distraction tip to engage a corresponding one of the adjacent vertebral bodies. (See Specification, page 28, lines 27-30; Fig. 3).

For claim 4 of the proposed count, Applicant discloses a method for establishing a disc space height that includes providing a distraction member having a distraction tip and at least one longitudinally extending fin. (See Specification, page 28, lines 27-30; Fig. 3). Applicant further discloses positioning the tip against the vertebral bodies and advancing the distraction tip between the adjacent vertebral bodies to restore the disc space height. (See Specification, page 22, lines 15-23 and page 28, lines 27-30; Figs. 2, 3, and 4).

For claim 5, Applicant further discloses providing a second distraction member having a fin, positioning the distraction member, and advancing the first and second distraction members. (See Specification, page 29, lines 20-23).

For claim 6, Applicant discloses a method for distracting a disc space including inserting a distraction tip between adjacent vertebral bodies and engaging a fin secured to the distraction tip with a corresponding one of the adjacent vertebral bodies. (See Specification, page 22, lines 15-23 and page 28, lines 27-30; Figs. 2, 3, and 4).

For claim 7, Applicant further discloses cutting into at least one of the adjacent vertebral bodies. (See Specification, page 28, lines 27-30, "sharp pegs 126...embed into the opposing vertebral bodies").

For claim 8, Applicant also discloses maintaining an orientation of the distractor tip during insertion. (See Specification, page 14, lines 11-14; and page 28, lines 25-27).

Applicant submits that the subject matter of claims 1-8 of the proposed count are fully supported by Applicant's original disclosure. The Examiner is requested to declare an interference between the present application and U.S. Patent No. 6,589,247.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this Request, such extension is hereby respectfully requested. If there are any

fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-1068.

Respectfully submitted,

MARTIN & FERRARO, LLP

Date: July 1, 2004

By: _____
Ameded F. Ferraro
Registration No. 37,129

1557 Lake O'Pines Street, NE
Hartville, Ohio 44632
Telephone: 330-877-0700
Facsimile: 330-877-2030

PROPOSED COUNT UNDER 37 C.F.R. § 1.607(a)(2)

1. A distraction member for distracting a disc space between adjacent vertebral bodies, comprising:

a distraction tip adapted for insertion between the adjacent vertebral bodies to distract the disc space; and

at least one fin secured to said distraction tip, at least a portion of the at least one fin extending transversely from said distraction tip and adapted to engage a corresponding one of the adjacent vertebral bodies.

2. A distraction member for distracting a disc space between adjacent vertebral bodies, comprising:

a distraction tip adapted for insertion between the adjacent vertebral bodies to distract the disc space, said distraction tip having a tapered distal portion; and

at least one fin, at least a portion of the fin extending transversely from said distraction tip and adapted to engage a corresponding one of the adjacent vertebral bodies.

3. A distraction member for distracting a disc space between adjacent vertebral bodies, comprising:

a distraction tip adapted for insertion between the adjacent vertebral bodies to distract the disc space;

a hub extending axially from said distraction tip, a portion of said hub extending transversely beyond said distraction tip to form a shoulder; and

at least one fin, at least a portion of the fin extending transversely from said distraction tip and adapted to engage a corresponding one of the adjacent vertebral bodies.

4. A method for establishing a disc space height between two adjacent vertebral bodies, comprising:

providing a distraction member having a distraction tip and at least one longitudinally extending fin secured to said tip;

positioning the tip against the adjacent vertebral bodies; and

advancing the distraction tip between the adjacent vertebral bodies to

restore the disc space height, the fin in intimate engagement with at least one of the adjacent vertebral bodies.

5. The method of claim 4, further including providing a second distraction member having a fin;

positioning the second distraction member with a fin adjacent the disc space laterally spaced from and in substantial alignment with the first distraction member; and

advancing the first and second distraction members into the disc space.

6. A method for distracting a disc space between two adjacent vertebral bodies, comprising:

providing a distraction member having a distraction tip sized for insertion within the disc space and at least one longitudinally extending fin secured to the distraction tip;

inserting the distraction tip between the adjacent vertebral bodies; and

engaging the fin with a corresponding one of the adjacent vertebral bodies.

7. The method of claim 6, wherein the engaging comprises cutting into the at least one of the adjacent vertebral bodies.

8. The method of claim 6, wherein the engaging maintains an orientation of the distraction tip during the inserting.